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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1186

MORRIS S. BROMBERG,

Petitioner,

VS.

THE CHAIRMAN, MEMBERS AND EXECUTIVE DIRECTOR OF THE UNITED STATES CIVIL SERVICE COMMISSION,

Respondents.

SUPPLEMENTAL BRIEF SUPPORTING PETITION FOR REHEARING

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KEENAN PRINTING COMPANY

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Petitioner, Morris S. Bromberg [Bromberg], files this Supplemental Brief in support of his pending Petition for Rehearing, pursuant to Supreme Court Rule 24 (5), in light of *Washington* v. *Davis*. #74-1492, decided June 7, 1976.

In the flurry of Civil Rights actions that followed *Griggs* v. *Duke Power Co.*, 401 U.S. 424, a number of conflicts arose between the various Circuits, which Washington has clarified.

This Court has now Held:

(1) A claim of unlawful discrimination will lie where there is a *claim* and a *prima facie* showing of "intentional discrimination"; and

(2) A finding by the trial Court, that there is a disproportionate failure by one group to qualify for employment over that of another group coupled with the fact that the

test or the employment practice has not been previously validated, is "sufficient" to meet the *prima facie* requirement and the burden then shifts to the defendants to show a "job relationship."

In his Amended Complaint, filed below, petitioner herein sought, *inter alia*, a declaration that the United States Civil Service Commission violated his Equal Protection rights under the Fifth Amendment, and invidiously discriminated against him because he was a *non*-federal applicant for the position of Administrative Law Judge rather than a *federal* applicant.

Thereafter, petitioner added an amendment claiming, *in addition*, a violation of his rights under Title VII, as amended in 1972.

The District Court *ignored* the *main* thrust of petitioner's complaint, namely, the violation of his rights to Due Process and Equal Protection under the Fifth Amendment, and rejected petitioner's prayer for relief for the reason that:

> "The Complaint, as Amended, does not allege any discrimination . . . because of race, color, religion, sex or national origin. . . . Consequently, Title VII . . . is *not applicable* to the instant case."
> (Ap. B. 12).[1] (Emphasis Added)

In *Washington*, the District Court determined that a higher percentage of blacks failed the test than did whites and that the test had not been previously validated. This showing was deemed *sufficient* to shift the burden of proof to the defendants. Thereafter, the District Court concluded, based on validation studies (note 17 of Supreme Court opinion) as well as by other evidence of record, that the Defendants had met their burden, and since there was no claim of "intentional discrimination", ruled that plaintiffs were not entitled to relief.

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1. Ap. B. 12 refers to the Appendix and page number in Petitioner's original Petition for Writ.

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Upon appeal, the Court of Appeals reversed the judgment of the District Court, upon an application of what it considered to be the legal standards applicable to Title VII cases,[2] and declared:

> "... that *lack* of discriminatory *intent* in designing *and* administering Test 21 was *irrelevant*."
> (emphasis added).

Thereafter, this Court granted the petition for Certiorari and after argument ruled:

> "Because the Court of Appeals *erroneously* applied the legal standards applicable to Title VII cases in resolving the *constitutional* issue before it, we reverse its judgment in respondent's favor."
> (emphasis added.

Since this Court ruled that it was error for the Court of Appeals in *Washington* to apply Title VII standards in resolving the *constitutional issue* before it, *a fortiori* it was "erroneous" for the District Court in *Bromberg*, to completely ignore the constitutional claim and to address itself solely to the Title VII issue, which was petitioner's secondary theory.

In reversing the Court of Appeals, this Court laid down the rule that where a claim of discrimination is made upon a constitutional basis, namely the Due Process clause of the Fifth Amendment, "a purpose to discriminate must be present" and where an infringement of constitutional rights of petitioners is involved, the facts in the case must warrant the conclusion that there was used "a purposeful device to discriminate" as "between *individuals* and *groups*."

Applying this rule in *Bromberg*, not only did the District Court err in failing to *resolve* the *constitutional* issue, it likewise failed to apply the legal standards re-

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2. Plaintiffs in *Washington* did not allege a violation of Title VII (see n. 6 of opinion)

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quired by the Due Process clause of the Fifth Amendment which:

> ". . . contains an equal protection component prohibiting the United States from invidiously discriminating between *individuals* and *groups*." (*Bolling* v. *Sharpe*, 347 U.S. 497, quoted with approval by this Court.)

particularly where it is shown that:

> ". . . a *purpose* to discriminate . . . [is] present . . . proven by . . . an unequal application of the law to such an extent as to show *intentional discrimination*." (Quoted with approval by this Court from *Akins* v. *Texas*, 325 U.S. 398, 403, 404).

That there is "intentional discrimination" in the case at bar is beyond dispute.

In its Finding #6 (Ap. B4) the District Court ruled that it was "error" for the Commission to discriminate against petitioner because he was an Assistant State Attorney General [*non*-federal applicant] rather than a *federal* applicant. In another finding (# 7, Ap. B5) the Court determined that the Commission gave an initial *higher* rating to federal applicants than to non-federal applicants and found, based on the statistics prepared by the Commission, that while only 95 (15.2%) out of 624 non-federal applicants were accepted, 58 (39.4%) of the 147 federal applicants qualified, a disparity ratio of 2½ times.

If any doubt existed as to the Commission's "intentional discrimination" against non-federal applicants, that doubt was resolved by the Commission's *admission* of discrimination, contained in a pleading filed by it below. (See top of p. 9 of Petition for Rehearing).

In its decision in *Washington*, this Court *agreed* with the District Court that the differential effect of Test 21, namely that a higher percentage of blacks failed the test than whites, *called for further inquiry*. As noted by this Court (note #15) the "federal parties" (the Commission) argued that:

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> ". . . in *Griggs* . . . the Supreme Court set a 'job relationship standard' . . . which has been a standard for federal employment since the passage of the Civil Service Act of 1883. In that Act, Congress has mandated that the federal government must use . . . examinations for testing applicants for appointment . . . which as far as possible relate to matters that fairly test . . . applicants for the appointments sought."[3]

In passing, it is appropriate to note that the Commission adopted the above language almost verbatim in its Code of Federal Regulations (Title 5 C.F.R. Part 300, et seq.). In fact, the Commission established a definitive standard requiring that:

> "There shall be a *rational relationship* between performance in the position to be filled and the employment practice used . . . which shall include a *showing* that the employment practice was *professionally* developed." (Title 5 C.F.R. 6300.103(b)(1) (Ap. E2)[3]

Thus, since there is here shown an undisputed "intentional discrimination" which by the standard set by this Court, shifted the burden to the Commission to show a "job-relationship", a burden which the Commission *wholly* failed to assume, it is now manifest that the District Court, in the case at bar, erred when it ruled, in the face of its own findings of discrimination and in the face of the admitted *intentional discrimination* by the Commission that:

> ". . . it is not necessary to decide whether a valid reason *exists* for the *discrimination*, nor to decide whether the *discrimination* is prohibited by Federal law or regulation." (Finding #7, Ap. B5). (Emphasis added.)

In view of the conflict between the District Court's ruling in the instant case and the rulings of this Court in *Washington*, there can be no doubt that the views of the highest Court in the land must prevail.

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3. Had the Commission followed its own argument and its own regulations in the case at bar, there would be no case at bar.

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Since the District Court in *Bromberg* predicated his ruling on the fact that there was no claim of discrimination on racial grounds, it is relevant to note that in his concurring opinion, Mr. Justice Stevens observed that if there is intentional discrimination in violation of the Constitution it is immaterial whether it is a "racial discrimination." As an example he referred to a case involving the unequal administration of an ordinance purporting to prohibit the operation of laundries in frame buildings. (Referring to *Yick Wo* v. *Hopkins*, 118 U.S. 356, where the Supreme Court ruled in 1886, that a purposeful and intentional discrimination between individuals and groups violated Equal Protection rights. Other cases not involving racial discrimination where relief was granted are shown on p. 7 of Petition for Rehearing.

Accordingly, it is respectfully submitted, that consistency on the part of this Honorable Court would appear to require the issuance of a Writ of Certiorari in the instant case, to permit consideration of the important federal issue involved, or that in the alternative, that this Court summarily reverse the order of the District Court and remand with instructions to reconsider in light of *Washington* v. *Davis*.

Respectfully submitted,

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